

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 23, 2002 Session

**STATE OF TENNESSEE v. TERRY STEWART MOORE**

Appeal from the Circuit Court for Blount County  
No. C-12303     D. Kelly Thomas, Jr., Judge

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No. E2001-00153-CCA-R3-CD  
August 2, 2002

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The defendant, Terry Stewart Moore, was convicted of voluntary manslaughter. See Tenn. Code Ann. § 39-13-211. The trial court imposed a Range II sentence of 10 years. In this appeal of right, the defendant challenges the sufficiency of the evidence and argues that the trial court erred by the admission of certain evidence. The judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed**

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Michael H. Meares (on appeal and at trial) and Charles Dungan (at trial), Maryville, Tennessee, for the appellant, Terry Stewart Moore.

Paul G. Summers, Attorney General & Reporter; Angele M. Gregory, Assistant Attorney General; and Tammy Harrington and William B. Reed, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

Keith Morrison lived next door to the defendant, Terry Stewart Moore, who shared a residence owned by the victim, Debbie Vanderpool. Shortly after supper on August 2, 1999, Morrison was working on his wife's vehicle when his attention was drawn to an argument between the victim and the defendant. Because he was "just used to" the couple arguing, he did not investigate further. When Morrison heard a windshield break, however, he looked out and saw the victim "kind of stagger[ing]" towards her residence. He then saw the defendant walk over and place his arms around the victim. Later, at approximately 10:00 P.M., Morrison heard the defendant yell, "Help! Help me, Keith!" When Morrison arrived at the defendant's residence, the victim, whose head and feet were a pale blue, was lying on the living room floor wearing only a towel around her waist. Morrison recalled saying that the victim appeared to be dead and the defendant responded, "Oh, God! No! She can't be." Morrison performed CPR on the victim, instructed the defendant how to perform CPR, and then returned to his residence to call 911. He noticed that the victim had a cut

on her lip which was not bleeding and that her body was covered in some kind of oil. After paramedics arrived, the defendant, who was sitting near the victim, picked up a condom pack and explained that he and the victim "practice[d] safe sex." Morrison accompanied the defendant to the hospital. During the trip, the defendant informed Morrison that he had been fighting with the victim, who had broken his car's windshield with a rock or a brick.

James Brian Tipton, a paramedic with the Rural Metro Ambulance Service, responded to a dispatch shortly after 11:00 P.M. When Tipton arrived at the defendant's residence, the victim had no pulse and was not breathing. After countershocking the victim, Tipton began CPR, placed a breathing tube down the trachea, and administered medications until an IV could be established. Tipton and the other paramedics were able to establish a pulse but the victim never regained consciousness. Tipton recalled that the defendant had encouraged the victim to breathe during the course of the paramedics' treatment. When asked what happened, the defendant explained that he had sex with the victim, went to the restroom, and, upon return, found that the victim was not breathing. The defendant claimed that the laceration, which went all the way through the victim's lip, had been sustained in a car wreck earlier that day. Tipton noticed that there was no blood residue from the laceration in or around the victim's mouth and that the victim's body had been covered with a "slick, oily-type substance." Tipton remembered that he had been in the defendant's residence on a prior occasion after the victim had taken a drug overdose.

When Deputy Jim Patty of the Blount County Sheriff's Department arrived at the scene, the victim was lying face up on the floor and the defendant was saying, "Wake up! Wake up!" Deputy Patty recalled that the victim was nude, her color was pale, and her body was cool. He stated that she had a small, deep cut on her lip. After the victim was transported from the residence for treatment, the defendant informed Officer Patty that he had gotten off work at approximately 2:00 P.M., that he and the victim had gone swimming and drinking, and that the victim had wrecked her vehicle on the trip home. The deputy remembered that the defendant said that he and the victim had argued, but that after returning to their residence, they had resolved the argument and had intercourse. He recalled that the defendant claimed that he had gone to the restroom and upon his return found the victim "jerking." Officer Patty did not recall smelling any alcohol on the defendant and saw no indication of blood where the victim lay. He saw no signs of battering or bruising other than older, black bruises on the inside of her left arm.

Danny Holbert testified that he had employed the defendant for approximately 10 days prior to the victim's death and that on August 2, 1999, after work, he, the defendant, and the victim decided to go to the river for a swim. Holbert recalled that the defendant became angry when the victim, who could not swim, was getting too close to deep water. After traveling to Walland to a different swimming hole, the defendant fell, hurt his back, and returned to the car. Holbert testified that later, when the defendant joined them at the swimming hole, he was angry and called the victim a "whore" and a "bitch." Holbert testified that he then asked the victim, who was driving her car, to drive him to his residence. Along the way, the defendant tore the mirror off the passenger's side of the car. Holbert stated that the victim responded angrily and struck the defendant. While the argument continued, she drove the car off the roadway, striking a ditch and a culvert or fence before

coming to a stop. Holbert testified that no one was injured in the wreck but that the car was stuck and that the defendant caught his fingers between the grill and bumper when the three tried to push the car from the ditch. Mark Stillwell, who had arrived at the accident scene in his vehicle, pried the defendant's fingers loose with a crow bar. Holbert testified that the defendant and victim continued to argue after the accident and that Mark Stillwell eventually drove them to their respective residences.

Melissa Kreager was on the telephone with her husband, Kenneth Kreager, when the wreck occurred at approximately 5:30 in the afternoon. Ms. Kreager, who lived near the scene of the accident, noticed that a female had been driving the vehicle and that no one appeared to be injured. She testified that the two men at the accident scene were intoxicated.

Kenneth Kreager testified that when he returned to his residence from work, the car involved in the accident was lodged on a fence post and that he saw a woman standing by the road while the two men were working on the engine. He stated that the woman, who was wearing a bathing suit and smoking a cigarette, did not appear to be injured, disoriented, or intoxicated.

Mark Stillwell, who lived near the scene of the accident, recognized the victim's car and knew the defendant. Stillwell recalled using a crow bar to free the defendant's hands, which were stuck in the bumper. He testified that he drove the defendant, the victim, and Danny Holbert to their residences. According to Stillwell, the defendant and the victim were arguing, "cussing at each other," while they were in the back of his pickup truck. He stated that the victim appeared to be uninjured and was "pretty well straight." When they arrived at the victim and defendant's residence, the victim grabbed the mirror of the defendant's Oldsmobile, which was parked in the driveway, as if she were going to twist it off the car. The defendant responded by running towards her and the victim released the mirror. According to Stillwell, the defendant picked up a cinder block and threw it at the victim but did not strike her.

About 30 minutes later, the defendant drove the Oldsmobile to Mark Stillwell's residence. The windshield was broken and the defendant remarked to Stillwell, "Debbie busted [my] windshield out." According to Stillwell, the defendant asked for assistance in removing the victim's car from the ditch but then discovered that he had failed to bring the keys. When the defendant returned later, Stillwell saw the victim in the car and she appeared to be fine. Stillwell testified that the defendant and the victim pushed the victim's car out of the ditch with the defendant's car. The defendant and the victim left at about 7:00 or 7:15 P.M.

Earlier in the afternoon, Joshua McCulloch, age 19, was with his friend, Bobby Stillwell, who was telephoned by his uncle, Mark Stillwell, asking for assistance in removing the victim's wrecked car from a ditch. Although the vehicle had already been removed when they arrived, McCulloch and Stillwell later went to the victim and defendant's residence and noticed that the defendant's car had a broken windshield. The defendant informed him that the victim had broken the window during an argument earlier that evening; he explained that he had fought with the victim because he believed she was having an affair with Danny Holbert. When McCulloch went inside the residence, he saw

the victim on the floor completely covered by a sheet. The defendant remarked that the victim was "doped up on pills and [had] passed out." At trial, McCulloch testified that he believed the victim was breathing at that time. He recalled that the defendant asked the two men to drive to the scene of the wreck to search for the victim's wallet, which he had thrown from her car window. Although the two men drove to the scene, they were unable to find the wallet and returned to the defendant's residence. Upon their arrival, the defendant was "getting up off the top" of the victim, holding onto his pants, and wiping Vaseline from his hands. McCulloch recalled that the defendant said that he "and his old lady [were] just fooling around a little bit." The two men then drove the defendant to a store where the defendant purchased cigarettes and a 12-pack of beer; upon their return, the victim, according to McCulloch, was lying in the same position as when they left but appeared to be breathing. McCulloch recalled that the defendant, who complained of being angry about his car and angry with the victim, threatened to kill both the victim and Holbert. According to McCulloch, the defendant at that point stood over the victim saying, "I ought to just pee in her mouth." He recalled that the defendant did, in fact, pour beer into her mouth until she began to choke and foam at the mouth. At that point, McCulloch asked the defendant to roll the victim over so she could cough up the beer. McCulloch testified that the defendant complied with his request but afterward kicked the victim several times in the side and sat on the couch with his feet on her, remarking that she made "a good foot prop." At another point during the evening, McCulloch observed the defendant jump off the couch to within inches of the victim's head, threatening to "stomp her head in while she was lying there." According to McCulloch, the defendant claimed that he had struck the victim in the jaw until he knocked her out, but then stated that he was joking. He testified that he and Bobby Stillwell left the defendant's residence just before ten o'clock and as they did so, the defendant picked up a hatchet and walked toward them in a threatening manner. McCulloch responded by grabbing a stick and demanding that the defendant to return to his residence. On cross-examination by the defense, McCulloch acknowledged that he had a delinquency adjudication in juvenile court for joyriding.

Bobby Stillwell corroborated much of the testimony provided by McCulloch. He recalled that when he and McCulloch returned from the scene of the wreck after looking for the wallet, the defendant appeared to be having sex with the victim. Bobby Stillwell confirmed that the defendant poured beer into the victim's mouth and kicked her in the side. He remembered that the victim lay on the floor for the entire period he was at the residence and that the defendant claimed to have "upper cut" the victim, whom he believed was having an affair with Holbert. Stillwell testified that as he and McCulloch left, the defendant displayed a hatchet and threatened to kill the victim. Bobby Stillwell, who had frequently visited the residence and knew that the defendant and the victim often argued and fought, stated that the victim rarely drank but took a lot of pills.

After learning of the condition of the victim, Detective Scott Carpenter of the Blount County Sheriff's Department drove to the defendant's residence and found the victim's car parked in the driveway with a flat tire and a broken passenger's side rearview mirror. He testified that the windshield of the defendant's car was broken. Detective Carpenter found a bathing suit in the living room, a container of Vaseline, and some baby oil. The detective returned to the hospital to speak with the defendant, then later learned that the victim had suffered massive blunt trauma to the head

and was not expected to live. The detective talked with Bobby Stillwell and Josh McCulloch before taking the defendant into custody and conducting a second interview. During questioning, the defendant denied that the victim was unconscious when McCulloch and Bobby Stillwell were at his residence. He also denied kicking the victim and insisted that he was not responsible for the victim's injuries or death. When Detective Carpenter, who noticed that the defendant appeared to have been beaten, asked about his injuries, the defendant informed him that the victim's brothers, whom he did not want to prosecute, had caused his injuries.

Gary Hamilton, a crime scene technician, obtained blood swabs from inside the victim's vehicle and found three blood splatters, one on the front passenger's side door panel just above the armrest, a second on the armrest itself, and a third on the "roof line" of the rear passenger's side door. According to Hamilton, both the driver's side mirror and the passenger's side mirror to the vehicle were broken. TBI Agent Kevin Helson, who performed a DNA analysis on the swabs from the vehicle, testified that the blood sample taken from the armrest matched that of the defendant. The blood sample from above the armrest matched the blood sample of the defendant at eight loci.

Dr. Carol Long, who was on call at the emergency room when the victim arrived by ambulance, evaluated the victim. Dr. Long spoke with the defendant, whose statement was included in the medical report:

He told me that they had gone to the lake, and the car ran off the road and had a flat tire; and she ended up hitting her head on the front of the car; that she had a little bit of a cut on the lip but, otherwise, seemed to be doing fairly well, and wasn't having any problems, and didn't want to seek medical attention; that afterwards, they went home and were sexually intimate; he came back from the rest room and found her in a seizure, and was unresponsive and turning blue; and she didn't stop seizing; and he ran to a neighbor's house and called 911; and then they came over and attempted to resuscitate her.

Dr. Long testified that the victim had suffered severe diffuse swelling of the brain tissue and a possible fracture of the maxillary sinus. Dr. Long determined from a drug screen that the victim was negative for alcohol but positive for benzodiazepine, a medication sold under the brand name Valium. Because the victim had acidosis, Dr. Long believed that the body had experienced a lack of blood flow for a significant period of time. Dr. Long described the victim's neurologic damage as severe and determined that she would not likely survive. Dr. Long expressed concern that the history provided by the defendant was not accurate because seizures rarely last beyond 30 seconds and believed that the victim's symptoms were more likely caused by either a severe trauma or a severe toxin. Dr. Long ruled out the car accident as the cause of death because only subdural bleeding could result in normal behavior for several hours after the injury; Dr. Long stated that subdural bleeding would ordinarily appear on a CT Scan and was not present in the victim's scan. She also stated that a sinus fracture would have caused pain which would have affected the victim's behavior after the injury. According to Dr. Long, the CT Scan did not indicate a sinus fracture and

she did not find a knot on the victim's head. Dr. Long acknowledged that a combination of alcohol and benzodiazepine could result in a deprivation of oxygen to the brain.

Dr. Michael Teague, who performed the autopsy, testified that the victim had experienced "a bit of bruising" on both arms and had a small laceration around the upper lip. He stated that there was swelling and hemorrhaging around the victim's brain, especially the area around the brain stem. Dr. Teague discovered blood and areas of pneumonia in the victim's lungs and injuries to her spleen. He stated that there were fractures to the base of the victim's skull which would have been caused by severe trauma, a blunt but not a penetrating force. It was his opinion that if the injuries causing death had been suffered in an automobile accident, the accident would necessarily have been "relatively severe." It was his conclusion that the car accident involving the victim was minor and that the injuries were unrelated to the wreck. Dr. Teague testified that the injury to the spleen could have been caused by a kick to the side. He described the cause of death as "trauma to the head resulting in . . . brain swelling" with death due to homicide. It was Dr. Teague's opinion that benzodiazepine could not have caused the type of injuries suffered by the victim. Dr. Teague stated that the victim would have been rendered unconscious as a result of the injuries she sustained.

Called as a witness for the defense, Sergeant Tim Wilson, an accident reconstructionist with the Blount County Sheriff's Department, testified that he found approximately 170 feet of skid marks at the scene of the accident. From his findings at the scene, he determined that the vehicle was traveling approximately 47 miles per hour when it rounded a corner and the brakes were locked. His examination of the driver's side of the vehicle, where the victim was positioned, revealed no blood and did not indicate a "human collision." Sergeant Wilson found no evidence that the seat belts were in use at the time of the accident.

Dr. Charles Harlan, who had for six years served as chief medical examiner for the state, was called as a witness for the defense. Dr. Harlan testified that he had reviewed the autopsy performed by Dr. Teague and had also concluded that the victim died as a result of a blunt-force trauma to the head. He testified that in his opinion, the injuries were not the result of a knife or hatchet wound, which would qualify as a sharp-force trauma. He described the injuries to the victim as "the least amount of injury that you can sustain and still produce death." It was his opinion that the victim's injuries were consistent with a fall, which might result in basal skull fracturing. Dr. Harlan believed that the injuries could have resulted from the accident and disagreed with Dr. Teague's conclusion that the victim's death was the result of a homicide. It was Dr. Harlan's opinion that the death was accidental.

In rebuttal, Dr. Bruce Levy, the chief medical examiner for the state and the county medical examiner for Davidson County, testified that he agreed that the victim had died as a result of blunt-force injuries to her head. It was his opinion that Dr. Teague was correct in determining that death was the result of a homicide, unrelated to an automobile accident. It was Dr. Levy's opinion from his review of the circumstances that the victim was uninjured in the accident and conscious for several hours afterward. Because there was so little damage to the vehicle and the victim, by all reports, was healthy for some time afterward, he ruled out the car accident as a possible cause of

death. It was also his opinion that a person who had received such an injury would not have willingly engaged in sexual intercourse afterwards.

## I

The defendant first argues that the evidence was insufficient. He complains that there was no evidence that he had committed a knowing killing of the victim, a requirement for voluntary manslaughter, and that there was no provocation, also a requirement, associated with the death of the victim. Because there was no evidence of a weapon, the defendant argues that the strongest view of the state's proof is that he caused the death of the victim by striking her with a fist, an act which, the defendant argues, would not qualify as knowing. He argues that the death of the victim could have been the result of an accidental blow to her head based upon the medical expert's agreement that "[a]lmost any diffuse impact to the vertex of the skull will produce basilar fractures." It is the defendant's further position that the circumstances did not rule out the possibility that the trauma causing death was suffered in the car accident. Finally, the defendant argues that there was no evidence that he acted in a state of passion after sufficient provocation.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

The standard for appellate review is the same whether the conviction is based on direct or circumstantial evidence. State v. Johnson, 634 S.W.2d 670, 672 (Tenn. Crim. App. 1982). A criminal offense may be established exclusively by circumstantial evidence. See Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958). The facts and circumstances, however, "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 225 Tenn. 478, 470 S.W.2d 610, 612 (1971). Like other factual questions, the determination of whether all other reasonable theories or hypotheses are excluded by the evidence is primarily a question of fact for the jury. Marable, 313 S.W.2d at 457.

The applicable statute provides as follows:

Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

Tenn. Code Ann. § 39-13-211(a).

A person acts "knowingly" with respect to a result of his conduct when he is aware that the conduct is reasonably certain to cause the result. Tenn. Code Ann. § 39-11-106(a)(20). A person acts "intentionally" with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. Tenn. Code Ann. § 39-11-106(a)(18). Thus, to convict the defendant of voluntary manslaughter, the jury must have concluded that the defendant, as the result of adequate provocation, either knowingly or intentionally killed the victim.

The evidence established that by the late afternoon of August 2, 1999, the defendant had accused the victim of having an affair, had argued with her, and had referred to her in abusive terms. Even after their car wreck, the defendant continued to argue with the victim, accusing her of infidelity. Shortly after they arrived at their residence, the defendant threw a cinder block at the victim. The defendant's car windshield was smashed, perhaps by the victim in response to the defendant's behavior. Later, Joshua McCulloch and Bobby Stillwell arrived at the defendant's residence to find the victim lying unconscious on the floor. McCulloch and Stillwell left the residence twice and each time they returned, the victim was lying in the same position, still unconscious. The defendant spoke to the victim in a threatening manner, poured beer into her mouth until she choked, and kicked her in the side. The defendant confessed to the two men that he had "upper cut" the victim and caused her unconsciousness. Only a short while after the departure of McCulloch and Stillwell, Keith Morrison arrived at the residence to find that the victim showed few, if any, signs of life. Expert testimony established that the victim had suffered fractures at the base of her skull and that the resultant brain swelling had caused her death. Two experts in pathology determined that the skull fractures could not have resulted from the traffic accident and observed that the statements the defendant had given to police were inconsistent with the physical condition of the victim. There was little damage to the vehicle involved in the wreck and, according to an accident reconstructionist, there were no signs of a "human collision" in the interior of the car.

Although it was Dr. Charles Harlan's testimony that the victim died as a result of an accidental fall, it was the prerogative of the jury to accredit the testimony of the state's witnesses. From all of this, a rational trier of fact could have concluded that the defendant had inflicted a heavy blow to the head of the victim, thereby causing her death. From this evidence, the jury could have inferred that the defendant acted either knowingly, that he was aware that his conduct was reasonably certain to cause the victim's death, or intentionally, that he consciously desired to cause the victim's death or engage in the conduct that resulted in her death. There was proof that the defendant was motivated to cause harm to the victim given his accusations that she was having an affair with Holbert. There was proof that the defendant, and the defendant alone, was with the victim during the entire time from her arrival at the residence until her death and that a blow to the head, unrelated to the car wreck, was the cause.



The defendant also argues that there was no evidence of provocation, an element of the crime of voluntary manslaughter. Tennessee Code Annotated section 39-13-211(a) defines that offense as the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

Although the jury received instructions on first and second degree murder, it chose to convict the defendant on the lesser offense of voluntary manslaughter. Under Article I, section 9 of the Tennessee Constitution, the jury has the right to accredit or reject the testimony of witnesses and ultimately determine the facts of the case. The trial judge has the duty to give a complete charge of the applicable law. State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986). There is an obligation “to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so.” Tenn. Code Ann. § 40-18-110(a). Pursuant to our statute and case law interpretations, defendants are entitled to jury instructions on all lesser offenses for which the evidence would support convictions. Complete instructions allow the jury to determine among each alternative the appropriate offense, if any, for conviction and to more evenly balance the rights of the defendant and the state.

In Howard v. State, 506 S.W.2d 951, 954 (Tenn. Crim. App. 1974), this court concluded that where the jury was warranted in convicting the defendant of second degree murder, it could also elect to convict of voluntary manslaughter, even though the facts did not comport with the technical definition of the crime. In State v. Smith, 695 S.W.2d 527, 529 (Tenn. 1985), our supreme court ruled that a defendant could not complain of being convicted of “a lesser included offense when he could have been convicted of a higher degree of homicide.” It is our view that the jury, under these circumstances, might have properly chosen to convict the defendant of a higher degree of homicide. Moreover, there was evidence of provocation. A state witness testified that the victim attempted to damage a sideview mirror on the defendant's vehicle. Circumstances suggested that she may have broken the windshield. The defendant argued angrily with the victim in the presence of other witnesses, expressed disdain for her well-being, and spoke of her with contempt as she lay unconscious on the floor. He kicked her. Although the defendant claimed to be kidding, he admitted to witnesses that he struck the victim with “upper cut” blows, an apparent response to their angry confrontation.

## II

Next, the defendant argues that the trial court erred by allowing evidence of other crimes, wrongs, or acts unrelated to this offense. Prior to trial, the defendant filed a motion in limine asking for an order limiting the testimony of Joshua McCulloch and Bobby Stillwell. In particular, the defendant sought to prevent evidence of the physical abuse administered by him to the victim, i.e., his pouring beer into her mouth, kicking her in the side, and having sexual intercourse with her while she was unconscious. The trial court denied relief. In support of his position, the defendant points to the following testimony from Dr. Teague:

Q. That she was unconscious at the time that whatever mechanism caused these inside-her-skull fractures, that she was unconscious from that time on?

- A. Right.
- Q. So, if witnesses come into this court and say she was passed out and somebody was slapping her, pouring beer on her, or doing something – having sex with her, or kicking her, that's not what caused her death because whatever caused her death has already been set in motion?
- A. Okay. Yes.

The defendant argues that the trial court should have excluded the testimony of Joshua McCulloch and Bobby Stillwell, who testified to the assaults made by the defendant against the victim after she had been rendered unconscious. The defendant asserts that the trial court erred by ruling that the evidence was admissible to show intent and premeditation on the part of the defendant, who was charged with first degree murder. The defendant submits that the evidence should have been excluded under Rule 404(b) of the Tennessee Rules of Evidence.

The state argues that the evidence was admissible under Rule 404(b) of the Tennessee Rules of Evidence for two reasons: (1) because the testimony related to offenses which were all part of the same criminal transaction resulting in the victim's death; and (2) because evidence of the defendant's abuse of the unconscious victim was relevant to the issue of intent.

Rule 404(b) prohibits the admission of other crimes, wrongs, or acts of the defendant when admitted to show a propensity on the part of the defendant to commit the crime charged. It does not bar the evidence, however, when those acts are relevant to issues other than character, such as intent, absence of mistake, or common scheme or plan. In our view, the acts committed by the defendant in the presence of Joshua McCulloch and Bobby Stillwell were part and parcel of the crime of voluntary manslaughter. The conduct was a part of the same criminal transaction, not a prior bad act but a concurrent bad act inseparable from the commission of the crime.

In our view, the testimony was also admissible to establish intent on the part of the defendant. The acts of physical abuse by the defendant towards the victim in the presence of other witnesses militates against his claim that death occurred as a result of the automobile accident. In State v. Smith, 868 S.W.2d 561, 574 (Tenn. 1993), our supreme court ruled that "violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense" were relevant to establish criminal intent "and a settled purpose to harm the victim."

Accordingly, the judgment is affirmed.

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GARY R. WADE, PRESIDING JUDGE